

NGUYEN (Migration) [2020] AATA 1932 (16 March 2020)

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DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mrs THI THU NGAN NGUYEN
CASE NUMBER:	1726126
DIBP REFERENCE(S):	BCC2017/1687067
MEMBER:	M. Edgoose
DATE:	16 March 2020
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 820 (Spouse) visa: • Public Interest Criterion 4020 for the purposes of cl.820.224 of Schedule 2 to the Regulations.

Statement made on 16 March 2020 at 10:50am

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Spouse) – false and misleading statements – sponsor left Australia – compassionate or compelling circumstances – birth of the couple’s second child – potential separation from her Australian children – decision under review remitted

LEGISLATION

Migration Act 1958, ss 5, 65
Migration Regulations 1994, Schedule 2, cl 820.224; Schedule 4 Public Interest Criterion 4020

CASES

Arora v MIBP [2016] FCAFC 35
Batra v MIAC [2013] FCA 274
Kaur v MIBP [2017] FCAFC 184

Plaintiff M64/2015 v MIBP [2015] HCA 50
Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

4. This is an application for review of a decision made by a delegate of the Minister for Immigration on 10 October 2017 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
5. The applicant applied for the visa on 9 May 2017. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl.820.224 of Schedule 2 to the Migration Regulations 1994 (the Regulations).
6. The applicant was represented in relation to the review by her registered migration agent.
7. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.820.224 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
9. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

10. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a

material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.

11. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
12. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
13. The applicant submitted to the Tribunal a copy of the delegate's decision dated 10 October 2017. According to the delegate's decision that applicant arrived in Australia on 22 February as the holder of a T300 visa which was valid until 9 November 2017. On 9 May 2017 the applicant lodged her application for a UK820/BS801 Partner visa which is the subject of this review. The applicant's sponsor is Mr Anh Men Bui.
14. According to the delegate's decision the reason for the applicant's refusal was that she had provided false and misleading statements on several occasions to the Department in various formats. These were in the form of verbal interviews and written statements.
15. On 21 July 2017 the applicant was interviewed by the Department regarding the whereabouts of her husband. The applicant claimed she had had dinner with the sponsor on 20 July 2017 and had cooked him "beef and veggie soup". The sponsor had actually departed Australia on 15 July 2017. The applicant was given the opportunity to respond. On 6 September 2017 the applicant according to the delegate's decision attempted to explain why she had provided false and misleading information about having dinner with her husband and why she stated that he was still in Australia. *"The applicant claimed she didn't want anyone knowing about their argument because she thought that it was bad and ashamed when a newly married couple argue. The applicant went on to state that she was still learning the Australian Law and through the if DIBP knew what the applicant and sponsor often argued then that would affect her visa application."* The applicant admitted to the Department that she had provided false information.
16. On 9 October 2017 the applicant was interviewed again by the Department and again she provided further misleading statements about the whereabouts of her husband. According to the delegate's decision the applicant's story changed again and she continued to provide false and misleading information to the Department. The Department found the responses from the applicant to be very strange given that she had no concern for her husband's whereabouts between 15 July 2017 and 21 July 2017 and that he, the sponsor was in Vietnam until 28 July 2017. Given that the applicant provided false and misleading information on numerous occasions the applicant does not meet PIC 4020(1).
17. Therefore, the applicant does not meet PIC 4020(1).

Should the requirements of PIC 4020(1) or (2) be waived?

18. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or

compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.

19. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
20. For the following reasons, the Tribunal is satisfied that the requirements should be waived.
21. On 6 March 2020 the applicant submitted via email to the Tribunal a copy of her second child's birth certificate. The father of the child is the sponsor of the applicant, Mr Anh Men Bui who is an Australia Permanent Resident and also father to their second child Selena.
22. Given that the applicant gave birth to the couple's second child, on 4 January 2020 the Tribunal is of the view that this raises compelling circumstances that affect the interests of Australia and compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen. The Tribunal does not consider that a parent, that being the applicant, should be separated from her children and be subjected to the exclusion period. Given this the Tribunal considers the requirements of PIC 4020 should be waived.
23. Therefore the requirements of PIC 4020 should be waived.

Has the applicant satisfied the identity requirements?

24. PIC 4020(2A) requires an applicant satisfy the Tribunal as to his or her identity. In this matter the Tribunal considers that the applicant has satisfied the identity requirements.
25. Therefore, the applicant meets PIC 4020(2A).
26. On the basis of the above, the applicant does satisfy PIC 4020 for the purposes of cl.820.224.

DECISION

27. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 820 (Spouse) visa:
 - Public Interest Criterion 4020 for the purposes of cl.820.224 of Schedule 2 to the Regulations.

M. Edgoose
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s.5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

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